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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1309

T. CARLTON RICHARDSON,

Petitioner,

v.

HOWARD UNIVERSITY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The facts of this case are fully and fairly stated in the Oral Opinion of the District Court (Petitioner's Appx, at 1a) and also its Memorandum and Order (Petitioner's Appx, at 7a).

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship, 28 U.S.C. § 1332.

ARGUMENT

The petition in this case presents two questions, neither of which is – or can be converted by petitioner into – one warranting review on certiorari.

1. The first question is one of pure teacher contract law: whether petitioner, a nontenured teacher employed by a private university, had a right to a grievance hearing after he was timely notified that he would not be reappointed upon the expiration of his one-year term contract. Petitioner's efforts to inflate this into a constitutional, or some other important, issue on their face beg the alleged federal question.

Petitioner, however, states that the first question (Petition, at 2) is:

> "Whether the grant of summary judgment *denied* the Petitioner his substantial right to a grievance procedure expressed in his contract of employment with the corporate Respondent thus abridging his Constitutional rights under the 7th and 5th Amendments and abusing the lower court's judicial power vicariously derived from 28 U.S.C. § 2072 [the Rules Enabling Act]."

We have italicized the word *denied* because the question, plainly enough, is not whether the summary judgment for respondents denied petitioner his right to a grievance procedure, it is whether petitioner had such a right in the first instance. As the District Court concluded from the uncontroverted facts found in the materials before it (Petitioner's Appx, at 3a-5a, 7a-8a), the statement of respondent University's employment policies at the time of petitioner's employment, the provisions of which "are deemed a part of every faculty member's contract" (Petitioner's Appx, at 4a), clearly gave him no right to a grievance hearing.

2. No amount of rhetoric and artfulness can breathe substance into the asserted abridgment of petitioner's Seventh Amendment right to a jury trial and Fifth Amendment right to a due process hearing. There is no jury trial issue in this case for two reasons: one, petitioner neither indorsed upon his complaint a demand for jury trial nor served a jury demand at any time thereafter and failure to do so constitutes a waiver of trial by jury, Rule 38(d), F.R. Civ. P.;[1] the other is that the constitutionality of summary judgment procedures was sustained long before adoption of Federal Rules of Civil Procedure. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902); *Irving Trust Co. v. American Silk Mills, Inc.*, 72 F.2d 288 (2nd Cir. 1934), cent. denied 293 U.S. 624; *Maryland Casualty Co. v. Sparks*, 76 F.2d 288 (6th Cir. 1935); *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N.Y. 133, 142, 143, 139 N.E. 216, 220 (1923); *Walter v. Walker*, 35 N. J. L. 262 (1871);

[1] Over a century ago this Court held that the right to jury trial, like other constitutional rights, can be waived. Kearney v. Case, 12 Wall, 275, 281 (1870). See also United States v. Moore, 340 U.S. 616, 621 (1951). And courts of appeals have held uniformly that the automatic waiver provision of Rule 38 does not violate the Seventh Amendment. See Wilson v. Corning Glass Co., 195 F.2d 825 (9th Cir. 1952); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964), cert. denied 377 U.S. 972; Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972); Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975). See also Cannister Co. v. Leahy, 182 F.2d 510, 514 (3rd Cir. 1950); United States v. Strewl, 99 F.2d 474, 478 (2d Cir. 1938), cert. denied 306 U.S. 668.

cf. *Ex parte Peterson*, 253 U.S. 300, 309, 310 (1920).[2]

3. A similar oversight infects petitioner's Fifth Amendment claim to a due process hearing. On the one hand, he ignores the fact that the Fifth Amendment is only applicable against governmental action that is federal in character. It is not directed against private parties. *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952); cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954). On the other hand, petitioner overlooks the lengthening line of cases holding that Howard University is a private educational institution and not a government instrumentality. See *Williams v. Howard University*, No. 74-1836, D.C. Cir., November 13, 1975; *Cobb v. Howard University*, 106 F.2d 860, 863, 70 App. D.C. 339, 342 (1939); *Maiatico Const. Co. v. United States*, 79 F.2d 418, 65 App. D.C. 62 (1935), cert. denied 296 U.S. 649; *Greene v. Howard University*, 271 F. Supp. 609, 612-613 (D.D.C. 1967), rev'd on other grounds 412 F.2d 1128, 134 U.S. App. D.C. 81 (1969); *Willis v. Cheek*, Civil No. 75-0389, D.D.C., April 30, 1975; *Sanford v. Howard University*, Civil No. 75-1034, D.D.C., February 26, 1976, app. noticed March 24, 1976.

4. Another issue asserted under the first question stated by petitioner is whether the summary judgment

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[2] "Given these precedents it is not surprising that there have been few cases under Rule 56 that have questioned its constitutionality. Rather, most courts simply have stated that the rule was not intended to deprive a party of a jury trial." Wright & Miller, Federal Practice And Procedure, §2714 at p. 413 (1969), citing Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1920) and Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

rule, as applied in this case, violates the Rules Enabling Act. This issue is insubstantial; and the argument advanced by petitioner is flimsy, too. Cleansed of tautology, it boils down to the proposition that the District Court, inasmuch as it rendered summary judgment on the basis of the affidavits of parties, withdrew an affiant from cross-examination by petitioner, and decided two "irrelevant, but *material* facts" (Petition at 14, 15) (emphasis petitioner's), applied the summary judgment procedure of Rule 56 in violation of the Rules Enabling Act's injunctions against abridging substantive rights and the Seventh Amendment guaranty of the right to jury trial.

The facts subsumed in this proposition do not sustain it. First, supporting and counter affidavits of parties are beyond doubt materials which a District Court is entitled to consider at a hearing on motions for summary judgment provided they are "made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), F.R. Civ. Proc. Moreover, it is clear that summary judgment may be rendered solely on the basis of affidavits meeting the testimonial requirements of Rule 56(e), see *Orvis v. Brickman*, 196 F.2d 762, 90 U.S. App. D.C. 266 (1952); *Surkin v. Charteris*, 197 F.2d 77 (5th Cir. 1952); *Dyer v. McDougall*, 201 F.2d 265 (2d Cir. 1952), without abridging any substantive right or the right to jury trial preserved by the Seventh Amendment.[3] Next, the fact

[3] However, as the Court observed in Beacon Theatres, Inc. v. Westover, "no similar requirement protects trial by the Court." 395 U.S. 500, 510 (1959). See The Genessee Chief v. Fitzhugh, 12 How. 443, 459-460 (1851); Ex parte Wall, 107 U.S. 265, 289 (1883); Bauman v. Ross, 167 U.S. 548, 593 (1896).

that affiants are not exposed to cross-examination at the hearing on a motion for summary judgment surely does not offend the Seventh Amendment save in cases like *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), a treble damage suit under the Sherman Act, where the litigation was complex, motive and intent were important, proof was largely in the hands of the alleged conspirators, and creditability was a weighty factor.[4] Petitioner's case, of course, only can be equated with *Poller* when "measured by the yardstick of a disappointed litigant or losing lawyer." *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957).

5. The second question stated by petitioner (Petition, at 2) is:

> "Whether summary judgment is appropriate in a suit involving a contract of employment consisting of an oral agreement and various written instruments solely upon the affidavits of interested parties."[5]

This issue, as the discussion in the immediately preceding paragraph shows, is also without merit and its

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[4] See White Motor Co. v. United States, 372 U.S. 253, 259 (1963): "Summary judgments have a place in the antitrust field, as elsewhere, though we warned in Poller . . . they are not appropriate 'where motive and intent play leading roles.' Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule can be divined without a trial." See also First Nat. Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 315 U.S. 788 (1942).

[5] It should be noted that these "various written instruments" were attached to, and made a part of, the affidavits filed by the opposing parties and that included in them are petitioner's appointment papers and all pertinent extracts from the Faculty Manual.

want of importance is indicated by petitioner's failure to argue, explain or even fairly intimate why the Court should decide it. Finally, petitioner has exercised his right of appeal to D.C. Circuit on the questions involved here: that, we submit, satisfies his rights as an individual litigant.

6. Thus, on these facts, the decision of the District Court and the affirmance of the Court of Appeals are clearly correct. In any event, the decisions below are in full accord – not contrary to – the principles expressed in decisions of this Court. There is no conflict among the circuits asserted by petitioner. Manifestly, there is no important question of constitutional or federal statute law requiring review by this Court. The time to terminate this litigation is now.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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